IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA:

Cr.A.No.238 of 2006

Judgment Reserved on 12.10.2006.

Date of Decision :.27.12.2006.

Bittu Ram …Appellant.

Versus:

State of H.P. …Respondent.

Coram:

The Hon'ble Mr.Justice Deepak Gupta, Judge.

Whether approved for reporting?[1]

For the appellant: Mr.Rakesh Manta, Advocate.

For Respondent. Mr.Ashutosh Burathoki, Addl. Advocate General.

Deepak Gupta, J .

This case discloses a very sordid state of affairs where neither the prosecution nor the Court thought it fit at the appropriate time to go into the question as to what is the age of the accused. In case this had been done at the appropriate time a long and unnecessary trial could have easily been avoided.

The background of the case is as follows:- The prosecutrix in this case was born on 22.4.1987. According to her in December, 1999 she had gone to the house of Dhani

[1] **Whether reporters of Local Papers may be allowed to see the judgment?**

Ram to attend the marriage of Asha Devi daughter of Dhani Ram who is her `Bua'. She stayed the night in Dhani Ram's house. Further according to the prosecutrix, appellant-Bittu, one other girl Pompa and the prosecutrix slept on one bed and one other person, namely, Devinder slept on another bed. In the middle of the night, accused Bittu tried to open the `Nara' of her salwar. The prosecutrix woke up and raised an alarm. The accused then placed his hand on her mouth. Thereafter the accused is alleged to have raped the prosecutrix. According to the prosecutrix when she was being raped, Devinder lit a match stick and saw what was happening but did not intervene. After she was raped the prosecutrix, the accused and Pompa kept sleeping on the same bed. In the morning, the accused promised to marry her and also threatened her that in case she told anybody about the incident then he would kill her.

According to the prosecutrix after some months she felt pain in the abdomen and in the month of `Sauz' (October) when she had gone to Hatkoti Temple to attend a fair, she met the accused there. She told the accused that she was pregnant and he asked her to keep silent. He gave her some medicines to abort herself. He had given her four capsules of some medicine. She consumed three capsules at one go and then she became unconscious. When she regained consciousness, her mother and another lady were present there who asked her how she had become pregnant. On their questioning, she told them about the incident. She went to the Police Station and

lodged the report on 25.6.2000 on the basis of which an F.I.R. (Ext.PW-2/A) was lodged.

After the F.I.R. was lodged, the police swung into action and investigated the matter. The challen was filed in the Court and finally the accused was convicted of having committed an offence under Sections 376 and 315 I.P.C. He has been sentenced to undergo rigorous imprisonment for a period of seven years under Section 376 I.P.C. and to pay a fine of Rs.2,000/- and in default of payment of fine to undergo rigorous imprisonment for one year. For the offence under Section 315 I.P.C., the accused has been sentenced to imprisonment for three years and to pay fine of Rs.1,000/- and in default of payment of fine to undergo imprisonment for six months.

At the outset, it would be pertinent to mention that when the challan was filed in Court, the only material on record with regard to the age of the accused-Bittu was the school leaving certificate (Ext.PW-12/A) in which the date of birth of the accused was shown to be 16.4.1984. The incident is alleged to have taken place in December, 1999. It is, thus, apparent that as per the challan on the date of the incident he was below 16 years of age. The accused was produced before the Court and granted bail on 1.7.2000. When the matter was pending before the Judicial Magistrate (Ist Class) Jubbal for committal proceedings, it had been urged before him that since the accused was a juvenile, his case had to be tried under the Juvenile Justice Act, 1986. On behalf of the prosecution, it had

been urged that it was not the date of the offence which was relevant but it was the date of production and the prosecution relied upon the judgment of the apex Court in **Arnit Das Vs. State of Bihar** ,AIR 2000 Supreme Court 2264. It would be pertinent to mention that no dispute with regard to the date of birth of the accused was raised at that stage. The Committal Magistrate, in my view, rightly held that this is a question which was not for him to decide since he was only a Committal Magistrate and he left this matter to be decided by the Sessions Judge since the offence otherwise was triable by the Court of Sessions.

At the relevant time under the provisions of the Juvenile Justice Act, 1986, a juvenile was defined as a person below the age of 16. Thereafter the matter was taken up by the Sessions Judge, Shimla, who in turn, assigned it to the Additional Sessions Judge, Shimla. Despite the observation made by the Committal Magistrate, the learned Additional Sessions Judge, Shimla proceeded to frame the charges against the accused without going into the question whether the accused should have been dealt with under the Juvenile Justice Act, 1986 (for short Act of 1986) or Juvenile Justice (Care and Protection of Children) Act, 2000 (for short `Act of 2000).

It would be pertinent to mention that on 1.7.2000 while dealing with the bail application of the accused, the learned Sessions Judge, Shimla had passed the following orders:

> "The counsel for the applicant says that the applicant is a juvenile offender as he was below 16 years of age at the time of the commission of the alleged crime. There is, however, no material on record in support of the claim of the counsel for the applicant. The applicant who is present in the court says that his date of birth is 16.4.1984, as per his certificate of educational qualification. He is directed to produce the certificate on 4.7.2000. Matter be put up on that date for consideration. Till then the order of interim bail dated 29.6.2000 shall remain in force. The applicant is directed to join the investigation."

Thereafter the accused apparently produced attested photo copy of his certificate when the learned Sessions Judge passed the following orders:

> "The applicant has produced photostat attested copy of the middle standard examination, per which his date of birth is 16.4.1984. The offence is alleged to have committed in December, 1999, when he was juvenile. The applicant being a juvenile, he shall have to be released on bail by the Officer Incharge of Police Station unless he feels that his release is likely to bring him into association with a known criminal, expose him to moral danger and his release would defeat the ends of justice. He does not release him on bail, but shall have to

send him to some Observation Home or a place of safety unless he is produced in juvenile court. This is clear from bare reading of Section 18 of the Juvenile Justice Act, 1986. In view of the above stated position the present petition is dismissed being infructuous. Record be completed and consigned to the record room."

Despite these clear cut orders whereby the learned Sessions Judge had come to the conclusion that Bittu appeared to be a juvenile, the trial proceeded before the Court of Sessions. It appears that because of the judgment in **Arnit Das**' case (supra) wherein the date of production of the accused was held to be the material date, and, as on the date of production the accused was more than 16 years, the learned trial Court without specifically dealing with the question as to whether the trial should be dealt with under the 1986 Act or the 2000 Act or under ordinary Law proceeded to hear the case and dealt with the matters under ordinary Criminal Law.

The statements of the witnesses were recorded. On 15.5.2002, the statement of the Investigating Officer PW-15 Shyam Lal Thakur was partly recorded. During the statement of the witness, he stated that he verified the age of the accused and found him to be below 16 years as per certificate Ext.PW-12/A. Thereafter his statement was deferred on the request of the Public Prosecutor. He was again examined on 16.8.2002 and on this date he stated that he had taken in possession the birth certificate of the accused from the Secretary Gram

Panchayat, Sheel. According to this certificate which is Ext.PW-16/A the date of birth of the accused is 15.3.1981. An application was filed for permitting the prosecution to produce such certificate which was allowed. The Investigating Officer was thereafter again examined and he stated that during the course of investigation he had taken into possession the Pariwar Register pertaining to the accused from Secretary, Gram Panchayat, Sheel, a copy of which is exhibited as PW-16/A. In cross-examination, he stated that certificate (Ext.PW-16/A) was produced by Shri Roop Ram, Secretary Gram Panchayat on 7.7.2000. He admitted that he had not recorded the statement of the Secretary, Gram Panchayat. He denied the suggestion that the Pariwar Register had been tampered with.

PW-16 Shri Dinesh Nekta, Secretary Gram Panchayat, Sheel was examined on 16.8.2002. He produced a copy of the Pariwar Register, according to which the date of birth of Bittu was 15.3.1981. Since there were several cuttings in this Register, the same was ordered to be retained by the Court. In defence the accused examined Shri Sewak Ram a J.B.T. Teacher who proved certificate Ext.DW-1/A according to which the accused was born on 16.4.1984.

Unfortunately, it took a lot of time to record the statement of the accused under Section 313 Cr.P.C. Thereafter, the defence witness was examined on 18.6.2004 and the case was listed for arguments. The arguments were heard on 13.10.2004 and on 19.11.2004 an application was moved on behalf of the accused for sending the case to the Juvenile

Court. This application was disposed of on 18.1.2006 by passing the following orders:

> " Heard. Per record of Gram Panchayat, the date of birth of the accused Bittu is recorded as 13.3.1981 in the record of Gram Panchyat, Sheel. In the aforesaid extract, the date of birth of other family members are also recorded. The accused has not rebutted the contents of the aforesaid extract and as such it has presumed to be true and entry about date of birth of the accused recorded as 13.3.1981, is taken as his date of birth in preference date entered in the school record as 16.4.1984. The accused was not a juvenile in December 1999 at the time of commission of the offence per the aforesaid record. Therefore, the prayer of the accused for his trial in Juvenile Court is declined. For arguments on 14.3.2006."

Finally the accused was convicted by the learned Addl. Sessions Judge, hence the present appeal.

I have heard Shri Rakesh Manta, learned counsel for the appellant and Shri Ashutosh Burathoki, learned Additional Advocate General for the State. There may have been some confusion with regard to the applicability of a particular Act or the relevant date on which the age of the accused was to be taken into consideration but all these matters now stand settled by a Constitution Bench of the apex

Court in **Pratap Singh Vs. State of Jharkhand and another** (2005) 3 Supreme Court Cases 551. The apex Court over ruled the judgment in ***Arnit Das'*** case (supra) and upheld the earlier view in ***Umesh Chandra Vs. State of Rajasthan*** . The Court held as follows:

> "37. The net result is:
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> (a) The reckoning date for the determination of the age of the juvenile is the date of the offence and not the date when he is produced before the authority or in the court.
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> (b) The 2000 Act would be applicable in a pending proceeding in any court/authority initiated under the 1986 Act and is pending when the 2000 Act came into force and the person had not completed 18 years of age as on 1.4.2001."

The first question to be decided is with regard to the age of the accused. Even as per the prosecution case as initially set up, the date of birth of the accused was 16.4.1984. It was only when the statement of the Investigating Officer was being recorded a new case was set up that his date of birth is 1981. The learned trial Court dealt with this matter in a very cursory and careless manner. It did not appreciate the importance of this point. As per the school certificate, which was proved by the prosecution itself as well as by the accused the date of birth of the accused was 16.4.1984. At a very belated stage an effort was made to prove another date of birth by bringing in the Pariwar register. It has been repeatedly held

by this court that not much reliance can be placed on the Pariwar register with regard to the date of birth. The proper register in this behalf is the Birth and Death Register which has not been proved. The Pariwar register produced in this case has many cuttings and over writings. The author of this certificate has not been produced. No evidence has been led to show how this entry with regard to the age of Bittu was made in the birth certificate or who made this entry. Even with regard to the date of birth, the column itself shows that it is an estimated age of the accused. To satisfy myself I again summoned the original Pariwar register. There are many cuttings and over writings in the register and in my opinion, not much reliance can be placed on this register. The register appears to have been prepared in the year 1989. The basis on which the entries, prior to 1989 have been incorporated in the register has not been proved by the prosecution. The prosecution from the very beginning had been stating that the date of birth of the accused was 16.4.1984. The prosecution has failed to show that the date of birth of the accused is actually 15.3.1981. Therefore, in my opinion, the accused being juvenile at the time of the commission of offence could not have been tried under the Ordinary Law.

I could have quashed the entire proceedings and sent the case back for decision to the Juvenile Court but in my opinion even on merits the conviction of the accused is not based on any justifiable grounds. He has already faced trial for

more than six years and to send him to a Juvenile Court would amount to prolonging his agony.

I have given the factual background of the case of the prosecution in the very beginning. According to the prosecution Pompa and Devinder were also sleeping in the same room in which the accused allegedly raped the prosecutrix. In fact Pompa is alleged to have been sleeping on the same bed on which the prosecutrix was raped. Both Pompa and Devinder have been examined. Both have turned hostile. Pompa has stated that her sister Asha Devi got married on 12.12.1999 and that on 14th December, 1999 her sister and in-laws had come to the parental house. According to her no rape took place in her presence. She was declared hostile and cross-examined at length but nothing material has been extracted. Devinder also turned hostile. He has also supported the defence and according to both these witnesses, no rape was committed in their presence. The learned trial Court has only relied upon the statement of the prosecutrix in convicting the accused.

There is no doubt that somebody did commit sexual intercourse with the prosecutrix. Dr.Reeta Mittal has stated that she examined the prosecutrix on 26.6.2000 and according to her observations, the prosecutrix had abortion within two weeks prior to her examination. She has admitted that the abortion took place after 12.6.2000. The F.I.R. was lodged on 25.6.2000. No effort was made by the Police to recover the aborted foetus so that D.N.A. test could be conducted to find out who had intercourse with the prosecutrix. It is settled law

that conviction can be maintained even on the sole testimony of the prosecutrix if it inspires confidence. In my opinion, in the present case, there are so many inherent contradictions in the statement of the prosecutrix that it is impossible to place reliance upon the same. First it is difficult to believe the statement of the prosecutrix that she, Pompa and the accused slept on one bed. Even though the prosecutrix was a minor girl aged about 13 years, Pompa was elder to her and there is no reason why these two girls would sleep on the same bed as a stranger. Normally girls are made to sleep in one room or at least on one side of the room and the men on the other side. It is even more difficult to believe that a rape could have been committed on a 13 year girl in the middle of the night on the same bed on which one other girl was sleeping.

Another flaw in the story of the prosecutrix is that why Devinder who admittedly lit a match stick did not raise an alarm when he saw that she was being raped. Devinder is not arraigned as an accused. It is very difficult to believe that both Pompa and Devinder would be mute spectators to a minor girl being raped. The prosecutrix in cross-examination has stated that when she subjected to rape, Pompa also woke up and hid herself under the cot. Pompa was 17 years when her statement was recorded in the year 2001. Therefore, she was about 15 years at the time when the alleged occurrence took place. It is difficult to imagine that a girl aged about 15 years would have hidden herself under the bed while rape was being committed on her companion. The story does not inspire confidence. The

version of the prosecutrix that thereafter they all went to sleep on the same bed makes the story even more unbelievable. Even a 13 year old girl is aware about the consequences of sexual intercourse and if she had been raped, she would not have gone back to sleep. The story is inherently unbelievable and no reliance can be placed on the statement of the prosecutrix.

A perusal of the evidence shows that there are many contradictions in the statement of the prosecutrix. According to the prosecutrix, the incident took place in December, 1999. The fact that Asha Devi was married in December, 1999 also stands proved on record. The prosecutrix admittedly had an abortion some time between 12.6.2000 and 26.6.2000 when she was examined by PW-1. Surprisingly the prosecutrix when she appeared in Court stated that in October when she went to attend the fair at Hatkoti Temple, the accused met her and when she informed him that she had become pregnant, the accused asked her not to disclose this fact to anybody. 11-12 days after the fair, the accused gave her four capsules and she consumed three out of four capsules in one go. Firstly her version that she attended the fair in the month of October cannot be true since even according to her she was raped in December and abortion took place in June. Therefore, the meeting in October could not have taken place. It would be pertinent to mention that the accused had given the months as per the Indian calendar and has stated that she went to the fair in the month of Sauz (October). Assuming that

she may have been mistaken to the month, some evidence could have come on record as to when the fair at Hatkoti Temple actually took place. There is no evidence on record to show what efforts, if any, were made to recover fourth capsule. No investigation has been done as to where the capsules were procured from.

Keeping in view the aforesaid discussion, in my opinion, it cannot be said that the prosecution has proved beyond doubt that the accused has raped the prosecutrix or got her aborted. The appeal is allowed and the conviction and sentence passed against the accused is set aside. The accused be set at liberty forthwith.

(Deepak Gupta),
Judge.

December 27 ,2006.(R)